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Caesar Would Have Arbitrated

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CAESAR WOULD

by **Hugh D. Spitzer**

With the recent increase in mandatory arbitration for small civil disputes and voluntary arbitration for much larger cases, it is easy to suppose that dispute resolution by someone other than a government-appointed judge is a novel, imaginative creation of the modern legal system.

But for the Romans who lived in Julius Caesar's time, indeed from several hundred years B.C. to at least 300 A.D., most civil matters never went to an official "judge." Instead, almost all such disputes were resolved by a lay arbitrator under a remarkably flexible and enduring system of civil procedure that worked as effectively as ours and, perhaps, more so.

By the time Caesar was conquering Gaul (58 B.C.), the Romans had developed a sophisticated legal system with both procedure and substantive law to match the complex "common market" economy that existed throughout the Mediterranean they ruled. At the center of that legal system for noncriminal matters were three key players: the praetor, an elected magistrate who functioned like a combination attorney general and presiding judge; the individual iudex, or lay arbitrator appointed to a case; and the iurisconsultus (jurisconsult) the legal scholar to whom a praetor or a iudex would turn when the legal going got tough.

The Romans had lawyers, too. Lots of them. But the creativity and responsiveness of their law came from the interplay between the prateor, the iudex and the jurisconsult, and the way that system worked, might give us a few useful ideas.

The Praetor's "Pretrial Order"

The urban praetor, elected annually in Rome by a citizen assembly, was the most significant legal official when Caesar was alive and for several hundred years thereafter. A "peregrine praetor" managed the Roman legal system outside Italy, although non-Roman citizens within the Empire were governed by their own laws. But for those under Roman law there were no permanent judges on government salary, no sheriffs or marshals, no clerks and no permanent courtrooms for civil disputes. If "Gaius," let us say, had a contractual dispute with "Sextus," and Gaius believed the two were unlikely to resolve it themselves, Gaius could have a draft "formula" drawn up, a document something like a demand for arbitration or a pretrial order. If Gaius knew something about law, he might draft the formula himself. Or, he might retain a lawyer or talk with a jurisconsult before delivering a summons to Sextus and submitting the draft formula to the praetor.

The praetor or his assistants would review the proposed formula with the defendant Sextus, and then would work with the parties to gain agreement on the wording of that pretrial order and the designation of an individual to serve as iudex, or arbitrator. We can review each piece of the formula to see how it worked.

1. The demonstratio, or first paragraph, said something like: "Whereas Gaius alleges that Sextus owes him 1,000 sesterces (the main Roman currency unit) under a contract for the sale of a horse and has neither paid the money nor returned the horse . . . ."

2. The assignment, or next paragraph, would read, "Let so-and-so (we'll call him Quintus) be iudex."

3. The condemnatio would then outline Quintus' assignment as iudex: "If it appears to you that Sextus is obligated to pay 1,000 sesterces to Gaius, then condemn Sextus to do so." The condemnatio could have in it a provision called a "taxatio," which was an upper limit on the plaintiff's recovery. This was important in matters such as personal injury, where the sum at issue was not readily obvious. The condemnation could also have a provision called a clausa arbitraria, which in essence gave a losing defendant the option of paying money or performing a specific act, e.g.: "If Sextus does not return the horse, then condemn Sextus to pay Gaius 1,000 Sesterces." This type of choice made sense to the Romans because, in their system, everything was reducible to money, and there were no equitable remedies.

4. The next section of the formula was the exceptio, a device developed by successive praetors to provide defenses that originally had not been available under Roman statutes. For example, an exceptio in our case might read, "If you find, as Sextus alleges, that Gaius had agreed not to collect within one year of delivery of the horse, then rule that Sextus shall not be required to pay until the agreed-upon time." This was known as an "exceptio pactum," or defense based on a prior agreement such as an agreement not to collect or not to sue. The praetors even developed exceptios against exceptios, such as, "If you find that the parties' pact was unlawful, then disregard that agreement in reaching your decision."

5. Finally, there could be a paragraph called a praescriptio, or restriction on the scope or timing of the case. For example, this section might delay the iudex's consideration of a matter until after the completion of a related criminal proceeding.

The point of detailing the components of this elaborate pre-trial formula is to show how it gave the praetor, who was usually well-trained in law, the ability to structure his submission to the lay arbitrator. Many upper-class Romans, the sort of men (never women) who served as iudex, had some legal education, but that was not always the case. The formula also gave the praetor the ability to shape law by shaping remedies, usually in accordance with an edict that each new praetor published upon assuming office. For example, the edict could declare that the praetor would provide an exceptio, or defense, for fraud, whenever he felt it was appropriate in a

HAVE ARBITRATED!

contract dispute formula that he issued to a iudex. The praetors used their annual edicts incrementally to adjust and add to remedies and civil procedure. Each praetor's edict looked pretty much like his predecessor's, so much alike that it became known as the "perpetual edict." But each year, one thing or another was changed, often based on public concerns and election promises, and this gave Roman law tremendous flexibility and an ability to change without relying on formally enacted statutes.

The Iudex and the Jurisconsult

Once the praetor handed a dispute over to the iudex agreed to by the parties, that arbitrator was responsible for determining the facts and applying the law, all within the confines of the formula given to him. That formula usually contained sufficient guidance for him to render a decision, much like good jury instructions that don't leave the factfinders worrying about what the law is or what it should be.

But the iudex was more than a juror, and it was not uncommon for him to discover something during the trial that needed further legal analysis. The praetor was far too busy to have every iudex run to him with a question about some fine legal point. Instead, the arbitrator seeking elucidation would often go to a jurisconsult, a man with the training, experience and time to consider the problem and render a solution. A jurisconsult would have been taught the law at the feet of a master lawyer or jurisconsult who belonged to one of the "schools" of legal theory in Rome. These were not schools in our sense, but rather separate and occasionally competing traditions of legal analysis handed down by generations of independent teachers. Aspiring lawyers would train with these teachers and work under attorneys within the same "school," much as nineteenth-century American barristers learned all they needed to know from a long clerkship under an older lawyer or judge.

In addition to teaching students, jurisconsults wrote textbooks and treatises on fields of law, published short statements of the law for practitioners and students (akin to "Secured Transactions in a Nutshell"), wrote massive commentaries on existing statutes, praetorian edicts or opinions, and rendered their own formal opinions on questions of law submitted to them by practitioners. The most-respected jurisconsultants had more than enough to do and, if they needed the money, could earn a decent living on the honoraria they received. Lawyers and jurisconsults were not "paid" for their work; since they were professionals, they performed their tasks for free, but they fully expected to receive a "voluntary" honorarium for their trouble. Many advocates and jurisconsults came from wealthy families and practiced law solely for community service or prestige. Others, like Cicero, started out with no independent wealth and relied on their work for a livelihood.

The iudex system of arbitration provided a fairly swift method of getting a case to trial, requiring very little time before governmental officials. A few standing juries were established to fix damages for certain types of injuries and penalties for various crimes, but the referral of disputes to lay arbitrators under a pretrial order remained the workhorse of the Roman civil law system until the late Empire. At the same time, the use of jurisconsults provided a way for a body of learned, and often creative, legal thinkers to develop novel approaches to problems. For example, at some time in the early development of Roman law, a father sought a way to emancipate his son, but found nothing in the statutes permitting it. A jurisconsult had the bright idea of applying an existing law to the effect that if a father sold his son into indentured servitude three times, the offspring would be free of parental power because three sales were cruel and unusual. Thus the clever jurisconsult had the father "sell" his son to a straw man three times consecutively, achieving the desired emancipation. This solution caught on, and over hundreds of years jurisconsults were responsible for many other useful developments in Roman law.

During the "principate," the early empire in the 200 years after Caesar's death, emperors began to designate certain favorite jurisconsults to speak with an imperial stamp of approval. This did not put the others out of business, but it may have led to greater consistency. At the same time, it gradually led to greater government control over what had been a remarkably independent legal system. But the tradition of independence lived on, and its strength (and the attack on that strength) is reflected in the fact that Papinian, one of the most famous jurisconsults, was killed by the Emperor Caracalla in 212 A.D., allegedly for refusing to compose a legal justification for the Emperor's murder of his own brother.

So it appears that arbitration by people other than full-time judges is not a new invention. And the Roman arbitration system had two features that might merit modern consideration: first, the use of a pretrial formula to officially delineate the scope of the arbitrator's task, and second, the arbitrator's referral of difficult points of law to an independent and learned specialist so that the arbitrator wasn't left guessing, or fabricating, legal theories about legal issues which he knew little about. There is something for us to learn in virtually every system of law that exists today or that existed in the past, but the Roman system, with a sophistication and flexibility that helped sustain the most advanced economy in the ancient western world, has some particularly useful notions.

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